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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

BANQUE DE FRANCE,

Appellant,

vs.

THE SUPREME COURT OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION.

JOHN FOSTER DULLES,
JOHN C. BRUTON,
Counsel for Appellees.

SULLIVAN & CROMWELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

IN THE MATTER OF THE APPLICATION OF BANQUE DE FRANCE,

Petitioner-Appellant,

For An Order of Restraint

against

THE SUPREME COURT OF THE STATE OF NEW YORK, HON. FELIX C. BENVENGA, INDIVIDUALLY AND AS ONE OF THE JUSTICES THEREOF, AND DANIEL DE GORTER AND HENRY WILD, AS ASSIGNEES OF BANQUE NATIONALE DE BELGIQUE,

Respondents-Appellees.

STATEMENT BY APPELLEES OF GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ASSERTED BY THE APPELLANT, PURSUANT TO RULE 12.

Pursuant to United States Supreme Court Rule 12, paragraph 3, the above named appellees present this, their statement, disclosing the matter or ground making against the jurisdiction of the Supreme Court of the United States

to review on appeal the judgment appealed from herein as follows:

I. The statute of the state, which is involved in this action, is Section 224 of the General Corporation Law of the State of New York (§ 224, L. 1909, ch. 28) which provides:

> "An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action."

II. The Court of Appeals of the State of New York has construed the above quoted statute to be inapplicable where the maintenance of an action thereunder imposes an undue and unreasonable burden upon interstate or foreign commerce. *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379 (certiorari denied, 298 U. S. 675). In that case it was held that an action could not be maintained by a resident of the State of New York (who, however, was not a resident when the cause of action arose) against a foreign corporation where the maintenance of the action would impose an undue and unreasonable burden upon interstate commerce.

In the instant case, therefore, the Court of Appeals was not, and the Supreme Court of the United States will not be, called upon to pass upon the validity of the New York State statute. The Court of Appeals was merely called upon to apply the New York State statute as interpreted by it in the *Fawcett* case, *supra*, and to see if its application to the appellant here would impose an undue and unreasonable burden upon interstate or foreign commerce. The Court held that application of this statute to the facts of the appellant would not impose an undue and unreasonable burden upon interstate or foreign commerce. The Supreme Court of the United States will not in this appeal be called upon to pass upon the validity of the New York State statute; it will merely be called upon to apply the statute as

construed by the Court of Appeals in *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379, to the appellant in this case.

III. The questions presented upon this appeal are not as stated in paragraph V of the appellant's jurisdictional statement. The question is solely whether the application of the New York State statute, as construed by the Court of Appeals in the *Fawcett* case, *supra*, to this appellant would impose an undue and unreasonable burden upon interstate or foreign commerce in violation of Article 1, Section 8, clause 3, of the United States Constitution. The appellant is appealing under Section 237 (a), as amended, of the Judicial Code (Section 344, Title 28, of the United States Code Annotated). Under this section the Supreme Court of the United States does not have direct appeals jurisdiction where a State statute has merely been misapplied. Such a case can only be reviewed by the United States Supreme Court where the Court in its discretion, upon petition for a writ of certiorari, directs the review.

If the jurisdiction of the Supreme Court of the United States depended upon a claim that a State statute as applied to a particular appellant, or to particular facts, is unconstitutional, the Court would be deluged with appeals. Mr. Justice Brandeis, in his dissenting opinion in the case of *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 298, said:

> "If jurisdiction upon writ of error can be obtained by the mere claim in words that a state statute is invalid, if so construed as to 'apply' to a given state of facts, the right to a review will depend, in large classes of cases, not upon the nature of the constitutional question involved but upon the skill of counsel."

Whether a statute is valid depends on the *power* of the State to enact it. In the case of *Baltimore and Potomac Railroad Company* v. *Hopkins*, 130 U. S. 210, the Court said at 224:

> "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise."

IV. This appeal does not present a question of law which will determine the rights of other litigants. It presents only a question of fact as to whether *this* appellant is so situated that the assumption of jurisdiction by the New York State courts over it, would impose an undue and unreasonable burden upon interstate and foreign commerce. The Court of Appeals of the State of New York said in its opinion in this case:

> "• • • the question here presented is not, as the petitioner contends, 'Are the principles of immunity under the Commerce Clause which are applied in the decision of this Court in the case of *Baltimore Mail S. S. Co. v. Fawcett*, 269 N. Y. 389, and in the decisions of the United States Supreme Court therein followed, applicable only in favor of corporate common carriers, or do they extend equally to all other foreign corporations engaged in interstate or foreign commerce?' The question which must be decided upon this appeal is whether under the principles of immunity under the commerce clause (U. S. Const., art. I, sec. 8), applied in the case of *Matter of Baltimore S. S. Co. v. Fawcett* (*supra*), the exercise of jurisdiction by the Supreme Court of the state in *this* suit which *these* plaintiffs have attempted to bring against *this* defendant in accordance with the laws of this state, is obnoxious to the commerce clause."

A decision on this question by the Supreme Court of the United States either on appeal or on certiorari would not determine any principle applicable to other cases. It would decide merely that the appellant could or could not be sued in the State Court of New York, and such a determination would depend upon whether assertion of jurisdiction over the appellant by the New York State Courts would impose

an undue and unreasonable burden upon foreign commerce. This question of fact would again have to be decided by this court whenever the question was put in issue by a party to an action.

The question of course is of no public importance or interest. The Supreme Court of the United States therefore does not have jurisdiction on a direct appeal and should not assume jurisdiction on a petition for a writ of certiorari.

V. For the reasons we have stated, the appeal herein is frivolous and does not raise a substantial Federal question.

VI. The jurisdictional statement of the appellant was not submitted to the Presiding Judge of the State Court allowing the appeal, directly contrary to Rule 12, paragraph 1, and Rule 46, paragraph 2, of the Rules of the Supreme Court of the United States. The appeal herein was allowed by the Presiding Judge of the Court of Appeals on March 7, 1942. The jurisdictional statement was not presented to him until March 24, 1942, whereupon he allowed it to be filed. The jurisdictional statement was not served by the appellant upon the appellees until March 25, 1942, or 18 days after the appeal was allowed, contrary to paragraph 2 of Rule 12 of the Supreme Court of the United States.

VII. The Supreme Court of the United States as recently as November, 1941, in *Baltimore & Ohio Railroad Co.* v. *Kepner*, 86 L. Ed. 37, expressed views directly opposed to the appellant's contention in this appeal.

Respectfully submitted,

SULLIVAN & CROMWELL,
Attorneys for Appellees.